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Kivalina Relocation Planning Committee

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

KIVALINA RELOCATION PLANNING
COMMITTEE

Plaintiff,

v.

TECK COMINCO ALASKA INCORPORATED,
Defendant.

Case No. A02-231 CV(JWS)

**PLAINTIFF KIVALINA
RELOCATION PLANNING
COMMITTEE'S OPPOSITION
TO MOTION FOR LEAVE
TO INTERVENE BY
NORTHWEST ARCTIC
BOROUGH**

I. INTRODUCTION

Plaintiff Kivalina Relocation Planning Committee ("KRPC") respectfully opposes the motion by the Northwest Arctic Borough ("NAB") to intervene as a defendant in this case. NAB is not entitled to intervene as a matter of right, nor does it meet the statutory criteria for permissive intervention, and so its motion should be denied.

KRPC's Opposition to Motion for Leave
to Intervene by Northwest Arctic Borough

Exhibit K
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1 **II. NAB IS NOT ENTITLED TO INTERVENTION AS OF RIGHT**

2 To intervene as of right under Federal Rule of Civil Procedure 24(a), an applicant must
3 claim "an interest relating to the property or transaction which is the subject of the action," the
4 protection of which may, as a practical matter, be impaired or impeded by the action if the
5 applicant is not allowed to participate in the litigation. *See* F.R.C.P. 24(a). In the Ninth Circuit,
6 Courts apply a four-part test to determine if an applicant has a right to intervene:

7 (1) the motion must be timely; (2) the applicant must claim a 'significantly protectable'
8 interest relating to the property or transaction which is the subject of the action; (3) the
9 applicant must be so situated that the disposition of the action may as a practical matter
impair or impede its ability to protect that interest; and (4) the applicant's interest must
be inadequately represented by the parties to the action.

10 *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993); *Wetlands Action Network v. U.S.*

11 *Army Corps of Engineers*, 222 F.3d 1105, 1113 (9th Cir. 2001). Here, although NAB's motion
12 is timely, it does not meet any of the three remaining, substantive factors for intervention as of
13 right.
14

15 **A. NAB does not have a "significantly protectable interest" relating to Teck**
16 **Cominco's permit or permit violations.**

17 This suit is a Clean Water Act enforcement action predicated on Teck Cominco's
18 thousands of violations of its Clean Water Act permits at its mine and port site in northwest
19 Alaska. NAB does not have, nor can it plausibly claim, a "significantly protectable interest"
20 relating to either the "property" at issue in this suit – Teck Cominco's two permits – or the
21 "transactions," the 2,171 violations of those permits KRPC has documented. Under *Sierra*
22 *Club v. United States EPA*, 995 F.2d 1478 (9th Cir. 1993), in order to demonstrate a
23 significantly protectable interest, NAB must show both 1) that the interest it is asserting is
24 legally protectable under some statute; and 2) that there is a relationship between this legally
25 protected interest and the claims at issue in the lawsuit. *Id.* at 1484. The interests NAB asserts
26 are not legally protectable and have little or no relationship to the liability issue in this case.
27
28

1 NAB claims a “significantly protectable interest” in Teck Cominco’s mine site permit.
 2 Motion at 6. This, it claims, is the “operation of the Red Dog Mine by the defendant” because
 3 the mine and associated haul road are the primary sources of revenue for the NAB. The
 4 potential economic effects from this suit alleged by NAB are entirely speculative, however, and
 5 do not confer a protectable interest on NAB in this litigation concerning the Clean Water Act,
 6 which regulates environmental and not economic interests. An economic stake in the outcome
 7 of litigation, “even if significant,” is not enough by itself to establish a “significant protectable
 8 interest.” *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993); *Portland Audubon v.*
 9 *Hodel*, 866 F.2d 302, 309. (9th Cir. 1989), *cert. denied*, 492 U.S. 911 (1989). Here NAB does
 10 not even have a direct economic stake in the case; NAB is not the permit holder, nor is it
 11 regulated under the permit at issue in this litigation.

14 NAB’s attempts here are in some ways analogous to private parties attempting to
 15 intervene as defendants in a National Environmental Policy Act case; because only the federal
 16 government is liable under NEPA, private parties cannot violate it and thus cannot be
 17 defendants in a NEPA compliance suit. *Churchill County v. Babbitt*, 150 F.3d 1072, 1082, *as*
 18 *amended by* 158 F.3d 491 (9th Cir. 1998); *Wetlands Action Network v. U.S. Army Corps of*
 19 *Engineers*, 222 F.3d 1105, 1114 (9th Cir. 2001). While the analogy is not perfect, here NAB 1)
 20 is not the permit holder; 2) cannot violate the permit; 3) has no responsibility for the violations
 21 that have occurred; and 4) has no role in achieving future compliance with the permit. Thus, it
 22 appears an unlikely defendant in this Clean Water Act enforcement action.

25 NAB also claims an interest in the use of lands adjacent to the creeks and rivers
 26 “affected by this lawsuit” because the “terms and conditions of the defendant’s NPDES permit”
 27 could, as a result of the suit, be inconsistent with NAB’s land use ordinance. Motion at 7. This
 28

1 purported interest also fails: KRPC's suit does not in any way seek to modify Teck Cominco's
 2 permits. KRPC's suit seeks 1) an injunction to require Teck Cominco to abide by its existing
 3 permits; and 2) penalties for Teck Cominco's 2,171 violations of those existing permits.
 4 Neither impinge in any way on NAB's land use ordinances, nor do they modify any terms of the
 5 existing permits. NAB thus has no legally cognizable interest in this suit.
 6

7 NAB asserts that "when a lawsuit directly affects permits or the use of real property,
 8 that intervenor's interests are 'squarely in the class of interests traditionally protected by law.'" *Id.*
 9 Motion at 8, quoting *Sierra Club, supra*, 995 F.2d at 1483. NAB's reliance on *Sierra Club* is
 10 misplaced, however. In *Sierra Club*, the Court allowed the City of Phoenix to intervene in a
 11 suit by the Sierra Club against U.S. EPA, because "the lawsuit would affect the use of real
 12 property owned by the intervenor [City of Phoenix] by requiring the defendant [EPA] to change
 13 the terms of permits it issues to the would-be intervenor, which permits regulate the use of that
 14 real property." *Id.* Here, however, the defendant Teck Cominco has no permitting authority
 15 over NAB, nor would any settlement affect real property owned by NAB other than causing
 16 Teck Cominco to abide by its pre-existing permit limitations – permit limitations not imposed
 17 by this lawsuit, but by the federal EPA in granting the permits in 1999. Teck Cominco's
 18 federal permits at issue here do not bind or regulate NAB in any way. NAB has no legal
 19 interest in the permits at issue here, unlike the permits held by intervenor City of Phoenix at
 20 issue in *Sierra Club*, which were "property rights and permits *owned by the City*." *Id.* at 1482
 21 (emphasis added).
 22
 23
 24

25 **B. The disposition of this Clean Water Act enforcement suit will not impair or**
 26 **impede NAB's ability to protect its interests.**

27 The primary interests NAB asserts are economic. If NAB desires to increase (or
 28 decrease) its cash flow from the Red Dog mine, that legislative issue is within the purview of its

1 decisionmakers' taxing authority. It is not, however, an issue in any way in this suit, which
 2 seeks only to have Teck Cominco abide by its federal Clean Water Act permits and pay
 3 appropriate penalties for its past and continuing non-compliance with those permits.

4 NAB also claims interests in the land around the mine site, which it asserts is subject to
 5 local land use regulation by NAB. Nothing in this suit, or its outcome, will impair or impede in
 6 any way NAB's ability to regulate local land uses within its jurisdiction. The suit is about a
 7 pre-existing federal permit which Teck Cominco is violating, not any new permit requirements.
 8 (In any event, even if it did impair NAB's local land use authority, the *federal* permit at issue in
 9 this case takes precedence over NAB's *local* land use regulation under well-settled
 10 Constitutional principles.)

11
 12
 13 **C. Teck Cominco can and does adequately represent and protect NAB's**
 14 **purported interests.**

15 NAB fails the final test for intervention as of right, as well, as Teck Cominco will
 16 adequately represent NAB's interests, which correspond almost wholly with Teck Cominco's in
 17 this suit. Both NAB and Teck Cominco want Teck Cominco to have the least possible
 18 economic consequences for its many Clean Water Act violations.

19 The Ninth Circuit requires that an intervenor's "interest must be inadequately
 20 represented by the existing parties." *Northwest Forest Resource Council v. Glickman*, 82 F.3d
 21 825, 836 (9th Cir. 1996) (affirming denial of motion to intervene). "Under well-settled
 22 precedent in this circuit, 'where an applicant for intervention and an existing party have the
 23 same *ultimate objective*, a presumption of adequacy of representation arises.'" *League of*
 24 *United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997) (citing
 25 *Northwest Forest*, 82 F.3d at 838) (internal quotation marks omitted; emphasis original). "The
 26 prospective intervenor bears the burden of demonstrating that existing parties do not adequately
 27
 28

1 represent its interests.” *Northwest Forest*, 82 F.3d at 838. NAB has not made the required
 2 showing and the Motion to Intervene should be denied.

3 The Ninth Circuit has consistently held that,

4
 5 In determining whether an applicant’s interest is adequately represented by the parties,
 6 we consider (1) whether the interest of the present party is such that it will undoubtedly
 7 make all the intervenor’s arguments; (2) whether the present party is capable and willing
 8 to make such arguments; and (3) whether the would-be intervenor would offer any
 9 necessary elements to the proceeding that other parties would neglect.

10 *Northwest Forest*, 82 F.3d at 838; *People of State of California v. Tahoe Regional Planning*
 11 *Agency*, 792 F.2d 775, 778 (9th Cir. 1986). Nothing in NAB’s motion establishes these criteria.

12 First, the interest of defendant Teck Cominco in avoiding penalties under the Clean
 13 Water Act for its 2,171 violations at the Red Dog mine are such that Teck Cominco will
 14 undoubtedly make all credible legal arguments to avoid or lessen them. Thus, all the arguments
 15 NAB might make on intervening will be or have already been made by Teck Cominco. Indeed,
 16 one need only compare the affirmative defenses NAB offers in its proposed Answer and
 17 Affirmative Defenses of Defendant-Intervenor (“NAB Answer”) to those in Teck Cominco’s
 18 Answer to see that Teck Cominco has already made all the non-frivolous affirmative defenses
 19 that NAB seeks to make in this suit; NAB’s duplicative defenses are surplusage.¹ Second, that
 20 Teck Cominco has already, in its Answer, made the non-frivolous arguments that NAB would

21
 22 ¹NAB makes several defenses that were not made by Teck Cominco that border on
 23 frivolous, including that KRPC “failed to give proper notice of this action,” NAB Answer at 30,
 24 that KRPC “failed to exhaust its administrative remedies,” *id.*, and that KRPC’s claims are
 25 barred by a statute of limitations. *Id.* at 31. First, that KRPC gave proper notice is not disputed
 26 in this case, see Teck Cominco’s Answer to Complaint at 5, ¶14. Second, there is no
 27 requirement that KRPC “exhaust its administrative remedies” before bringing an enforcement
 28 suit under the Clean Water Act. 33 U.S.C. §505; *National Wildlife Federation v. Consumers*
Power Co., 657 F. Supp. 989, 1000 (W.D. Mich. 1987), *rev’d on other grounds*, 862 F.2d 580
 (6th Cir. 1988) (“the Court must follow Congress’ intent to allow private parties to maintain
 suits pursuant to section 505 of the Act even though they may not have participated in prior
 administrative proceedings.”). Third, as NAB should well know, the statute of limitations for
 violations of the Clean Water Act is five years, plus 60 days before the complaint is filed,
Sierra Club v. Chevron, 834 F.2d 1517, 1523-1524 (9th Cir. 1987), and each of the 2,171
 violations documented in KRPC’s suit occurred after January 1, 1999.

1 like to make demonstrates that it is both capable and willing to do so. NAB does not meet the
 2 Ninth Circuit's factors for showing that its interests are inadequately represented in this suit by
 3 Teck Cominco, and its motion should be rejected. *Northwest Forest*, 82 F.3d at 838.

4
 5 **D. NAB meets none of the substantive requirements for intervention as of**
 6 **right.**

7 NAB does not have a significantly protectable legal interest relating to the "property or
 8 transactions" at issue in this suit, Teck Cominco's thousands of violations of its mine and port
 9 site permits. The economic and land use interests NAB does assert will not be impaired or
 10 impeded in any way by the disposition of the suit. Finally, NAB's interests are adequately
 11 represented by Teck Cominco, which has already made all the credible affirmative defenses
 12 asserted by NAB. NAB's motion to intervene as of right must fail.

13
 14 **III. THIS COURT SHOULD NOT PERMIT NAB TO INTERVENE**

15 F.R.C.P. Rule 24(b)(2) gives the District Court discretion to permit intervention "when
 16 an applicant's claim or defense and the main action have a question of law or fact in common....
 17 In exercising its discretion the court shall consider whether the intervention will unduly delay or
 18 prejudice the adjudication of the rights of the original parties." Here, where NAB has no
 19 claims, and where it offers no additional substantive contributions in the way of credible
 20 affirmative defenses, NAB's intervention will serve no purpose but to prejudice the rights of the
 21 original parties to speedily resolve this case.

22
 23 Permissive intervention is a two-stage process. First, the district court must decide
 24 whether one of the grounds for such intervention exists. If this threshold requirement is met –
 25 which, here, it is not – the court must then exercise its discretion in deciding whether
 26 intervention should be allowed. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977).
 27

28 NAB's attempts to intervene in this suit and introduce new burdens on KRPC (and Teck

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1 Cominco), including affirmative defenses that border on frivolous, is reminiscent of the
 2 situation in *Mannasota-88 v. Tidwell*, 896 F.2d 1318 (11th Cir. 1990), where the Florida Electric
 3 Power Control Group ("FCG") attempted to intervene in plaintiff's Clean Water Act suit. As
 4 the Eleventh Circuit ruled,

5
 6 Appellant seeks to inject numerous issues into the case, such as the EPA's authority to
 7 require Florida to enact antidegradation standards and plaintiff's standing to sue.
 8 Plaintiff commenced this action to hasten compliance with the Clean Water Act, and
 9 intervention by FCG would severely protract the litigation. Although we express no
 10 opinion as to the merits of plaintiff's claims, an action which seeks to preserve the
 11 environment from further deterioration deserves refuge from the undue delay that would
 12 result from appellant's intervention.

13 *Id.* at 1323.

14 IV. CONCLUSION

15 Because NAB does not meet the requirements for intervention as of right, and because
 16 its intervention would prejudice KRPC and result in delay of the resolution of the suit, KRPC
 17 respectfully requests that this Court deny NAB's motion to intervene. KRPC would not oppose
 18 an application by NAB to submit a brief of *amicus curiae* to bring any issues it deems salient
 19 before this Court; its attenuated interests in these proceedings make *amicus* participation, rather
 20 than party status, most appropriate.

21 Date: 1/12/02

22 Respectfully submitted,

23 CENTER ON RACE, POVERTY
 24 & THE ENVIRONMENT

25 
 26 Luke W. Cole

27 LAW OFFICES OF THOMAS DOSIK

28 Attorneys for Plaintiffs
 Kivalina Relocation Planning Committee

CERTIFICATION OF SERVICE

I, Luke W. Cole, am over 18 years of age and not a party to this action. My business address is 450 Geary Street, Suite 500, San Francisco, CA 94102.

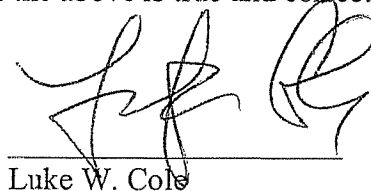
On November 12, 2002, I served the PLAINTIFF KIVALINA RELOCATION COMMITTEE'S OPPOSITION TO MOTION FOR LEAVE TO INTERVENE BY NORTHWEST ARCTIC BOROUGH and [PROPOSED] ORDER DENYING MOTION FOR LEAVE TO INTERVENE on the following parties by U.S. mail, postage paid:

Lawrence Hartig
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717 K Street
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Landy Bennett
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Anchorage, AK 99501

I certify under penalty of perjury that the above is true and correct. Executed on November 12, 2002 at San Francisco, CA.

A handwritten signature in black ink, appearing to be 'LW Cole', written over a horizontal line.

Luke W. Cole

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